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Supreme Court, U.S.
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In The
Supreme Court of the United States

RICHARD M. STUMBO,

Petitioner,

v.

DYNCORP PROCUREMENT SYSTEMS, INCORPORATED, f/k/a DynCorp Aerospace Operations, Incorporated; DYNCORP AEROSPACE OPERATIONS, INCORPORATED; DYNCORP AEROSPACE OPERATIONS, (U.K.), LIMITED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Ann K. Crenshaw
Counsel of Record
Thomas M. Lawson
LAWSON AND SILEK, P.L.C.
160 Exeter Drive
Suite 103
Post Office Box 2740
Winchester, Virginia 22604
(540) 665-0050

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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QUESTIONS PRESENTED

1. Is a party with hypertension precluded by summary judgment from recovery under Federal Rule of Civil Procedure 56 under the Americans With Disabilities Act, 42 U.S.C. § 2117(a) based on a disability or perceived disability which significantly limits one or more of the major life activities, where he is disqualified from the class of employment of an International Police Monitor?

2. Is a party with hypertension per se precluded by summary judgment from recovery under Federal Rule of Civil Procedure 56 from recovery under the Americans With Disabilities Act, 42 U.S.C. § 2117(a) based on a disability or perceived disability which significantly limits one or more of the major life activities, where his hypertension is controlled by medication?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the Court below, as required by Rule 14.1(b) of the Rules of the United States Supreme Court:

1. Richard M. Stumbo,
   Plaintiff/Appellant/Petitioner;

2. DynCorp Procurement Systems, Incorporated,
   Defendant/Appellee;

3. DynCorp Aerospace Operations, Incorporated,
   Defendant/Appellee;

4. DynCorp Aerospace Operations (U.K.), Ltd.,
   Defendant/Appellee;

5. Ann K. Crenshaw, Attorney for the
   Plaintiff/Appellant/Petitioner;

6. Michelle L. Bodley, Attorney for the
   Defendants/Appellees;

7. Steven W. Ray, Attorney for the
   Defendants/Appellees.

CORPORATE DISCLOSURE STATEMENT

DynCorp Procurement Systems, Incorporated, DynCorp Aerospace Operations, Incorporated and DynCorp Aerospace Operations (U.K.), Ltd. have parent corporations. The parent is DynCorp Aerospace Operations, Incorporated; the grandparent is DynCorp Technical Services, Incorporated; and the great-grandparent is DynCorp. There is no publicly held company that owns ten percent (10%) or more of the company's stock.

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OPINIONS AND ORDERS ENTERED BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is attached as an appendix. (App. at 1).[1] The opinion of the United States District Court for the Western District of Virginia is published at 130 F.Supp.2d 771 and is attached as an appendix. (App. at 5).

JURISDICTION STATEMENT

The decision of the United States Court of Appeals for the Fourth Circuit affirming the order of the United States District Court for the Western District of Virginia granting summary judgment was entered on September 5, 2001. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute at issue in this case is the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12102(2) which states:

> "The term 'disability' means, with respect to an individual - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

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[1] Citations to the Appendix will be referred to as "App. at ___".

Title 29 of the Code of Federal Regulations, 1630.2(j) provides as follows:

> With respect to the major life activity of working -
>
> (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
>
> (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following facts may be considered in determining whether an individual is substantially limited in the major life activity of "working":
>
> > (A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Rule 56(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

Fed. R. Civ. P. 56(b).

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . ."

Fed. R. Civ. P. 56(c)

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner (hereinafter "Mr. Stumbo") filed a Complaint with the Equal Employment Opportunity Commission (hereinafter "EEOC") in early 1997. On July 7, 1998, the EEOC issued its Determination. (App. at 12). Mr. Stumbo subsequently brought a suit under the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA"), alleging three (3) claims: that he was subjected to discrimination on the basis of disability, § 12101(2)(A); that DynCorp Procurement Systems, Inc., DynCorp Aerospace Operations, Inc. and DynCorp Aerospace Operations (U.K.), Ltd. (hereinafter collectively referred to as "DynCorp") improperly regarded him as disabled, § 12102(2)(C); and that DynCorp failed to provide a reasonable accommodation for the hypertension, § 12112(b). DynCorp has moved for a summary judgment on all

counts. The United States District Court for the Western District of Virginia granted DynCorp summary judgment on all counts on January 29, 2001. (App. at 5).

The Notice of Appeal was timely filed on February 7, 2001. The United States Court of Appeals for the Fourth Circuit affirmed the order of the United States District Court for the Western District of Virginia on September 5, 2001. (App. at 1).

B. STATEMENT OF FACTS

Petitioner is a Marine Corps veteran of the Vietnam War and is a retired District of Columbia police officer. Mr. Stumbo alleged that DynCorp discriminated against him by failing to hire him for the position of International Police Monitor ("IPM") in Bosnia because of a disability or a perceived disability in violation of the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. (hereinafter the "ADA" or "the Act"). Although his physical impairment, hypertension, continues to be successfully treated with prescription medication, Mr. Stumbo alleged that he was deemed by DynCorp to be medically incapable of performing major life activities which foreclosed him from the position of IPM. Additionally, DynCorp perceived Mr. Stumbo as disabled. The United States District Court for the Western District of Virginia wholly adopted DynCorp's assertation of the facts and totally dismissed the facts as put forth by Mr. Stumbo. The United States District Court for the Western District of Virginia entered summary judgment in favor of the Defendants.

In March of 1996, Mr. Stumbo forwarded an original resume to DynCorp. On April 30, 1996, Mr. Stumbo received a United States State Department Request for Biological Data from DynCorp which he duly completed and returned. On August 12, 1996, Mr. Stumbo was notified by DynCorp that he had been selected for the position of IPM. He received the package from DynCorp, including physical examination forms and related information regarding the position, which contained information which would enable him to prepare to depart for Bosnia.

As directed, Mr. Stumbo obtained a physical from his personal physician, Dr. Mark Vickers. Dr. Vickers rated Mr. Stumbo a "category 1" - fit for all physical and manual duties. Dr. Vickers prescribed six (6) months of medication for treatment of his hypertension following the DynCorp recommendations as to the appropriate duration of the prescription contained in the DynCorp employment package.

On September 6, 1997, DynCorp, through its employee, Austin Bryan, advised Mr. Stumbo via telephone that there was a problem with his physical examination. On September 9, 1997, Mr. Stumbo was advised by DynCorp that he was rejected for the position of IPM because he had "high blood pressure" and "hypertension." As such, DynCorp found Mr. Stumbo to be medically incapable of performing the position of IPM in Bosnia.

Later, through the discovery process, it was learned that DynCorp withdrew the offer of IPM to Mr. Stumbo after his medical documents revealed that he had hypertension, even though Mr. Stumbo's doctor has provided medical clearance for the assignment as

an IPM. DynCorp never requested a medical examination by its own doctor or doctors. DynCorp perceived Mr. Stumbo to be substantially limited in his ability to perform the duties of IPM because of a perceived impairment. DynCorp placed Mr. Stumbo in the category of an individual who did not meet the job requirements of an IPM because of his hypertension.

Mr. Stumbo filed a Complaint with the EEOC in early 1997. The EEOC conducted a thorough investigation and on July 7, 1998, issued its Determination (App. at 12). The EEOC found that all requirements for coverage under the Act had been met. The EEOC correctly concluded that DynCorp withdrew the offer of IPM because it found Mr. Stumbo to be medically incapable of performing the job because of his hypertension.

The EEOC correctly noted that DynCorp never requested a medical examination by its own doctor, even though Dr. Vickers, Mr. Stumbo's personal physician, concluded that Mr. Stumbo was medically capable of performing the job. The District Director of the EEOC also determined that DynCorp perceived Mr. Stumbo to be substantially limited in his ability to perform the duties of IPM because of his physical impairment, and thus, placed Mr. Stumbo in the category of an individual who did not meet the minimum qualifications set out in DynCorp's contract with the United States State Department. In fact, the District Director of the EEOC concluded that there was reasonable cause to believe Mr. Stumbo was denied employment because of his record of disability or because he was regarded as a person with a disability.

DynCorp discriminated against Mr. Stumbo by failing or refusing to hire him because of his record of treatment for hypertension, or because Mr. Stumbo was regarded as a person with a disability. DynCorp perceived that Mr. Stumbo was medically incapable of performing major life activities required of IPMs such as, but not limited to, walking, running, lifting, climbing stairs, personal survival skills, ability to adapt to cold weather and defense of his personal safety. DynCorp believed that Mr. Stumbo was medically incapable of performing the broad range of jobs which include any non-sedentary activity such as walking, running, climbing stairs or any form of physical exertion. In particular, DynCorp placed Mr. Stumbo in the category of an individual who did not meet the minimum qualifications for the specific position of IPM.

The deposition of Dr. Peter McDougall, a physician retained by DynCorp, indicates he advised DynCorp that Mr. Stumbo was medically incapable of performing the job, and that he perceived Mr. Stumbo as medically incapable of performing the job. The testimony of Dr. McDougall demonstrates that DynCorp's own physician believed that it is appropriate to assess a candidate's body mass and other physical attributes prior to reaching a conclusion regarding medical incapacity. As such, DynCorp should have followed its own internal procedures and requested an independent review of Mr. Stumbo. DynCorp violated its own procedures which allowed for follow-up by the candidate's own doctor. In this instance, the follow-up correspondence from Dr. Vickers was never reviewed by Dr. McDougall or DynCorp. Succinctly, DynCorp categorized Mr. Stumbo as disabled without the benefit of review or examination.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FOURTH CIRCUIT'S REVIEW UNDER THE AMERICANS WITH DISABILITIES ACT OF A DISABILITY OR PERCEIVED DISABILITY WHICH SIGNIFICANTLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES FROM THE CLASS OF JOBS OF AN INTERNATIONAL POLICE MONITOR IS INCONSISTENT WITH APPLICABLE LAW.

It is a well settled legal principal that a decision granting summary judgment shall be reviewed by the court on a *de novo* basis. Jones v. Wellham, 104 F.3d 620, 626 (4th Cir. 1997). Under the Federal Rules of Civil Procedure at Rule 56(c), the applicable standard is "whether 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Corrigan v. Perry, 1998 WL 129929 (4th Cir. 1998). A court should not grant summary judgment unless there is no genuine issue as to a material fact). Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944).

Additionally, the evidence shall be viewed in a light most favorable to the non-moving party, in this case, Mr. Stumbo. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986). The Court must consider on the record as a whole. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Summary

judgment is only appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Corrigan, supra. 1998 WL 129929. Further, a genuine issue of material fact cannot be created through "mere speculation or the building of inference upon another." Id. *citing* Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). Summary judgment is only appropriate where the evidence "is so one-sided that one party must prevail as a matter of law." Anderson, supra., 477 U.S. at 252, 106 S.Ct. at 2509. Moreover, "the non-movant is given 'wide berth to prove a factual controversy exists.'" McKenzie v. Donvala, 242 F.3d 967 (10th Cir. 2001). (Citations omitted).

The ADA of 1990 prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability. Specifically, the ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). To establish a prima facie case of employment discrimination under the ADA, the plaintiff must establish that (1) he is disabled within the meaning of the Act; (2) he is qualified to perform the essential functions of the job either with or without accommodation; and (3) he has suffered adverse employment action because of the disability. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

"The ADA's definition of a 'qualified individual with a disability includes an individual who can perform the essential functions of the job [s]he holds or desires.'" (emphasis in original). McKenzie v. Donvala, supra., at 242 F.3d at 974. Moreover, the ADA covers applicants as well as employees. Id. at 974. The ADA protects not just the actually disabled, but also those who are merely regarded as disabled. Indeed, the ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). "The determination of whether an individual is disabled under the ADA should be made on an individualized, case-by-case basis." DeMar v. Car-Freshner Corp., 49 F.Supp.2d 84, 90 (N.D.N.Y. 1999). *See also* Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 151 (2d Cir. 1998); Ryan v. Grae & Rybicki, 135 F.3d 867, 872 (2d Cir. 1998) ("[T]he determination whether an impairment 'substantially limits' a major life activity is fact specific.".)

This determination depends upon whether the disability or impairment substantially limits a "major life activity." In all cases, a disability or impairment, real or perceived, must be substantially limiting, thereby foreclosing generally the type of employment involved, not just a narrow range of job tasks. *See also* Andress v. National Pizza Company International, Inc., 984 F.Supp. 475, 483 (S.D. Miss. 1997); Hutchinson v. United Parcel Serv., Inc., 883 F.Supp. 379, 390-91 (N.D. Iowa 1995). Such a determination of disability depends upon the effect the impairment has upon a particular individual rather than the name or diagnosis of the

impairment. *See also* Deghand v. Wal-Mart Stores, Inc., 926 F.Supp. 1002 (D. Kans. 1996); Chandler v. City of Dallas, 2 F.3d 1385, 1396 (5th Cir. 1996), cert. denied, 511 U.S. 1011, 114 S.Ct. 1386 (1994) ("[T]he effect of a given type of impairment, both on major life activities in general and on a person's ability to perform specific tasks, can vary widely from individual to individual.".)

The EEOC regulations provide that an individual is substantially limited with respect to working if he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i) (1999). Moreover, the regulations further elaborate on what is meant by a "class of jobs." Id. § 1630.2(j)(3)(ii)(B), or a "broad range of jobs in various classes." Id. § 1630.2(j)(3)(ii)(C), limiting the inquiry to the geographical area "to which the individual has reasonable access." Id. § 1630.2(j)(3)(ii)(A). With respect to "a class of jobs," a court must consider "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities." Id. § 1630.2(j)(3)(ii)(B). Bartlett v. New York State Board of Law Examiners, et al., 226 F.3d 69 (2nd Cir. 2000). There are a number of relevant factors in considering whether the impairment substantially limits an individual's ability to work:

(1) the geographic area to which the individual has reasonable access;

(2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or

abilities, within the geographical area, from which the individual is also disqualified because of the impairment (class of jobs); or

(3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Deghand, supra, 926 F.Supp. at 1012-13. *See also* Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994), cert. denied, 513 U.S. 1152, 115 S.Ct. 1104 (1995).

The general type of employment in this case is that of an International Police Monitor described by the United Nations and United States State Department. The job of IPM is a specific type or class of employment. An IPM is not a class of jobs which can be equated with that of a basic security position, such as a night watchman. An IPM is a unique type of employment utilizing a wide range of skills encompassing not only skills related to the police or security professions, but also including a component of para-military skills. The universe of availability for such positions is dictated by the international political environment. At the time Mr. Stumbo was denied employment, there were only two (2) geographic areas of the world in which an IPM position was available - Bosnia and Haiti. The Haitian position required that the applicant speak French in a Creole dialect, a skill which Mr. Stumbo did not possess. Accordingly, the universe of the class of jobs available to Mr. Stumbo as

an IPM was extremely small. Each of these positions for the wide category of IPM were, in DynCorp's opinion, jobs for which a person with hypertension would not be hired.

II. CERTIORARI IS WARRANTED IN THIS CASE BECAUSE THE FOURTH CIRCUIT'S PER SE DENIAL OF A CLAIMANT WITH HYPERTENSION UNDER THE AMERICANS WITH DISABILITIES ACT OF A DISABILITY OR PERCEIVED DISABILITY WHICH SIGNIFICANTLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES WHERE THE CLAIMANT'S HYPERTENSION IS CONTROLLED BY MEDICATION IS INCONSISTENT WITH APPLICABLE LAW.

The United States District Court for the Western District of Virginia held that Mr. Stumbo failed to present any evidence that his hypertension substantially limits his ability to perform a major life activity. However, Mr. Stumbo has clearly and sufficiently alleged that he is disabled within the meaning of the ADA. Mr. Stumbo suffers a physical impairment - hypertension. Untreated, hypertension may result in cardiovascular disease, cardiac arrest, stroke, organ damage such as kidney failure, and other physical ailments. While Mr. Stumbo has been able to control his hypertension with medication, he risks suffering complications and hospitalization without appropriate medication. But as noted by his physician, Dr. Vickers, Mr. Stumbo's hypertension is "well controlled with therapy" contingent upon Mr. Stumbo treating his condition with two prescribed medications. DynCorp's determination that Mr. Stumbo was

incapable or medically unsuited to perform IPM duties, particularly in Bosnia, is based upon the presumption that while in such environments, Mr. Stumbo would be unable to get his needed medications.

The United States District Court for the Western District of Virginia held that persons suffering from hypertension when controlled by medication are not disabled per se and therefore, not covered by the ADA. In fact, DynCorp contends that the Supreme Court's rulings in Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) and Murphy v. UPS, Inc., 527 U.S. 516, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999), stand for the supposition that hypertension generally cannot be a "disability." To the contrary, the determination regarding disability under the ADA is fact-specific and does not preclude the use of medications or corrective devices. This Court has stated that "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures - both positive and negative - must be taken into account when judging whether that person is 'substantially limited' in a major life activity." Sutton, supra, 527 U.S. at 488, 119 S.Ct. 2139. The use of corrective devices or mitigating measures "does not, by itself, relieve one's disability." Sutton, supra, 527 U.S. at 488, 119 S.Ct. at 2149. *See also* Oswalt v. Sara Lee Corp., 74 F.3d 91, 92 (5th Cir. 1996) ("We do not imply that high blood pressure in general can never be a 'disability,' as defined by the statute."); Bey v. Bolger, 540 F.Supp. 910 (E.D.Pa. 1982) (finding that plaintiff's hypertension and hypertensive cardiovascular disease made it impossible to perform his job duties without endangering his own health and safety). Accordingly, the United States District Court for the Western District

of Virginia should have considered the specific factual issues of this particular case instead of a blanket holding that Mr. Stumbo was not disabled " . . . under the ADA, as his condition is correctable via medication." (App. at 11). Stumbo v. DynCorp Technology Services, Inc., 130 F.Supp.2d 771, 774 (W.D. Va. 2001).

More importantly, DynCorp perceived Mr. Stumbo to be "substantially limited" in his ability to perform duties as law enforcement and logistics personnel as a result of his hypertensive condition. DynCorp stated that they determined Mr. Stumbo's hypertensive condition disqualified him from successfully performing his duties within the "hazardous conditions of a post-war environment" where electricity, running water, food and medical supplies were not allegedly readily available. This determination by DynCorp contemplated that Mr. Stumbo's hypertension would not be treated with medication, suggesting that Mr. Stumbo may not have access to medication with which he controls his condition. Therefore, the analysis of Mr. Stumbo's hypertensive condition must be examined in totality - with and without medication - in determining whether he qualifies as disabled under the ADA. Clearly, based upon DynCorp's own admissions, DynCorp believed and found that Mr. Stumbo suffers from an impairment which is substantially limiting. It follows that the Trial Court cannot rule on a summary basis pursuant to Federal Rule 56(c) without considering the facts as presented by Mr. Stumbo.

"[T]he ADA is concerned with preventing substantial personal hardship in the form of significant reduction in a person's real work opportunities."

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 949 (8th Cir. 1999); Webb v. Garelick Mfg. Co., 94 F.3d 484, 488 (8th Cir. 1996). In analyzing whether plaintiff is substantially limited in the ability to work, "the kinds of jobs from which the impaired individual is disqualified must be carefully considered." Colwell v. Suffolk Co. Police Dept., 158 F.3d 635, 643 (2d Cir. 1998) (citations omitted). As previously stated, the factors in considering whether the plaintiff is substantially limited include "(1) the number and type of jobs from which the impaired individual is disqualified, (2) the geographical area to which the individual has reasonable access, and (3) the individual's job expectations and training." Welsh v. City of Tulsa, 977 F.2d, 1415, 1419 (10th Cir. 1992) (quoting Jasany v. U.S.P.S., 755 F.2d 1244, 1249 (6th Cir. 1985)).

Under the ADA, the disabled individual must be able to perform essential functions required of the job, with or without reasonable accommodation. "Essential functions" are "fundamental job duties of the position in question." Andress, supra, 984 F.Supp. at 484 (quoting Haysman v. Food Lion, Inc., 893 F.Supp. 1092, 1101 (S.D.Ga.1995)). The courts have held that the statutory definition of a "qualified individual" includes individuals who can perform the "essential functions" of a position with or without reasonable accommodation which the individual either "holds or desires." Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1111 (9th Cir. 2000) cert. granted, in part, 121 S.Ct. 1600, 149, L.Ed.2d, 467 (2001). *See also* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161-62 (10th Cir. 1999), on remand, 98 F.Supp.2d 1233 (D.Kan. 2000).

"Reasonable accommodation" may include "any change within the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. §1630.210. *See also* 42 U.S.C. §12111(9). The ADA prohibits employers from discriminating against a disabled employee by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. §12111(8).

Here, Mr. Stumbo sought a position with DynCorp to work as law enforcement and logistics personnel, specifically International Police Monitor, as part of the United Nations International Police Task Force (IPTF) stationed in Bosnia. It is important to note that pursuant to a contract with the United States State Department, DynCorp provides law enforcement and logistics personnel in numerous locations throughout the world. Despite Dr. Vickers' assessment that Mr. Stumbo was "fit for all physical and manual duties," DynCorp unilaterally determined after a cursory review of Mr. Stumbo's application and without the benefit of a follow-up physical examination, that Mr. Stumbo's weight, smoking and hypertension prevented him from performing the essential tasks required. There was no follow-up of this decision as was the DynCorp normal procedure.

It is undisputed that Mr. Stumbo has the required skills and experience to perform the essential duties of IPM with the reasonable accommodation of

allowing access to hypertension medication. The only necessary accommodation was that DynCorp make the needed hypertension medication accessible to Mr. Stumbo while overseas. In fact, Mr. Stumbo had made arrangements to take sufficient medication with him to Bosnia. Such an accommodation would be neither expensive nor difficult as similar accommodations had been afforded to other employees of DynCorp. Therefore, DynCorp cannot successfully argue that this accommodation would generate an undue burden upon DynCorp.

In light of the above facts, it is apparent that Mr. Stumbo's hypertension, weight and tobacco use substantially limited his employment opportunities as an IPM. The evidence indicates that DynCorp refused to consider Mr. Stumbo for any IPM positions whether in Bosnia, Haiti or elsewhere, thereby resulting in a significant restriction. To qualify as a significant restriction, it is not necessary that Mr. Stumbo be excluded from every job for which he is qualified. *See also* Bartlett, supra, 226 F.3d at 83; Fjellestad, supra, 188 F.3d at 955. (The ADA "does not require a showing that absolutely no employment opportunities exist.")

In Murphy v. UPS, Inc., supra 527 U.S. 516, 119 S.Ct. 2133, the Supreme Court affirmed the lower court's findings that the plaintiff was not disabled as his impairment only affected his ability to perform his duties as a mechanic when that job requires driving a commercial motor vehicle. Under those facts, the plaintiff was unable to obtain DOT certification required to operate commercial vehicles due to his hypertension. Id., 527 U.S. at 520-23,119 S.Ct. at 2137-39. Similarly, in Sutton v. United Air Lines, Inc., supra, the Supreme Court stated that the plaintiffs' severe

myopic impairment only limited them from holding positions as global airline pilots, but not as pilots for domestic carriers or courier services. Therefore, the plaintiffs failed to demonstrate that their impairment substantially limited them from performing major life activities. Id., 527 U.S. at 491-94, 119 S.Ct. at 2151-52. Here, DynCorp concluded that Mr. Stumbo's impairment (with or without hypertensive medication) precluded him from obtaining any positions with DynCorp. Mr. Stumbo does not narrowly allege that DynCorp's improper determination barred him from a position in Bosnia, but from all possible positions, including Bosnia. Therefore, the United States District Court for the Western District of Virginia is incorrect in holding that Mr. Stumbo's impairment excludes him from only one type of job or a particular job of choice.

The Trial Court found that Mr. Stumbo's ability to secure subsequent employment demonstrates that Mr. Stumbo is not disabled under the meaning of the Act. As previously stated, Mr. Stumbo need not show that all employment opportunities are barred or limited, but that he is significantly restricted from a class of jobs. The field of international law enforcement and security is a narrow field or class of jobs. It is factually not contained within the classification of law enforcement officers or police officers or mall security patrols. Indeed, these job classifications are dissimilar. The class of jobs at issue in this case is a narrow one as confirmed by DynCorp's own published criteria for the position.

Individuals may fall within the ADA's definition of being "regarded as" having a disability when: (1) the covered entity mistakenly believes that person has a physical impairment that substantially

limits one or more major life activities, or (2) the covered entity mistakenly believes that an actual nonlimiting impairment substantially limits one or more major life activities. Sutton, supra, 527 U.S. at 476-77, 119 S.Ct. at 2144. Whether an individual is "regarded as" having a disability "turns on the employer's perception of the employee" and is therefore "a question of intent, not whether the employee has a disability." DeMar, supra, 49 F.Supp.2d at 94 (quoting Francis v. City of Meridan, 129 F.3d 281, 284 (2d Cir. 1998)). Therefore, the focus of the analysis is upon whether the employer knew of the claimant's condition, and if so, whether they believed that it substantially affected his ability in a major life activity. Id. *See also* Daley v. Koch, 892 F.2d 212, 215-16 (2d Cir. 1989); Young v. Bank of Boston Connecticut, 1995 WL 908616 (D.Conn. 1995). (The court held that the defendants regarded the plaintiff's stress-related heart condition, although controlled with medication, impaired his ability to regularly attend work foreclosing success in any position thereby violating the provisions of the ADA.)

Clearly, DynCorp knew of Mr. Stumbo's disability as his hypertensive condition (with or without medication) was the basis for rescinding the offer of employment to Mr. Stumbo. DynCorp's recruiter, Austin Bryan, unilaterally determined that Mr. Stumbo's hypertension rendered him unfit to perform the essential functions of the IPM position. This determination was made based on a cursory review of Mr. Stumbo's medical application by Dr. Peter McDougall who was not provided with correct information regarding IPM job duties or a description of conditions in Bosnia and without the benefit of any

follow-up physical examination or medical evaluation of Mr. Stumbo by DynCorp's physicians. Moreover, DynCorp did not follow its routine procedure to follow up with an additional evaluation.

The adoption of DynCorp's argument by the United States District Court for the Western District of Virginia is problematic: DynCorp asserts that it believed Mr. Stumbo's medical condition rendered him incapable to perform as an IPM but it did not regard Mr. Stumbo as disabled. In support of this circular reasoning, DynCorp cites Mr. Stumbo's current employment and employment history. However, while DynCorp assumed that Mr. Stumbo would not be able to receive medication while stationed in war-torn Bosnia, this same assumption applied to DynCorp's consideration of Mr. Stumbo for any other IPM positions located elsewhere. Therefore, DynCorp's determination regarding Mr. Stumbo's disability cannot be limited to the IPM position in Bosnia alone.

This is similar to the facts in Coleman v. Southern Pacific Transportation Co., 997 F.Supp. 1197 (D.Ariz. 1998). In Coleman, the plaintiff was refused employment as a train crew member (who would be later certified as a locomotive engineer) based on his limited vision. Although the plaintiff lacked vision in one eye, he had good vision and perfect color perception. Defendant claimed that it perceived the plaintiff's monocular vision as substantially limiting his ability to work as a train crew member and locomotive engineer, thereby disqualifying the plaintiff from specific positions only. But the defendant admitted that concerns about the plaintiff's personal safety extended to all jobs within the transportation

class wherein mobile forms of equipment could injure him. The court held that the plaintiff produced sufficient evidence showing that the defendant viewed the plaintiff's impairment as constituting a substantial limitation on his ability to work. Id., at 1205. The court distinguished those facts from Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996) Cert. denied, 519 U.S. 1093 117 S.Ct. 770, 136 L.Ed.2d 715 (1997), stating that the defendant's perception of the plaintiff's impairment (monocular vision) restricted the plaintiff's access to a greater number of jobs than in Bridges, where the plaintiff was disqualified for a firefighting position due to hemophilia. Coleman, 997 F.Supp. at 1205-06.

In this case, DynCorp's perception of Mr. Stumbo's impairment restricted his access to all IPM and related positions. Although DynCorp insists that Mr. Stumbo's medical condition, especially untreated, barred him access to a specific job, in reality, DynCorp's determination precluded Mr. Stumbo from working in an environment such as Bosnia where Mr. Stumbo may encounter difficulty in receiving medication to treat his hypertension and in performing the essential duties. Accordingly, contrary to the decision of the Trial Court, Mr. Stumbo presented an argument that DynCorp regarded him as substantially limited from a life activity.

CONCLUSION

This case presents important questions regarding the judicial interpretation of the definition of classes of employment under the Americans With Disabilities Act, 42 U.S.C. § 2117(a). In addition, this case raises an important question as to whether a

claimant may be treated as disabled when his impairment is correctable through medication. This per se classification by the United States District Court for the Western District of Virginia, which was affirmed by the United States Court of Appeals for the Fourth Circuit, creates a conflict in the circuits. Moreover, this case poses a critical question concerning the judicial interpretation of the Americans With Disabilities Act. It is most significant that the United States Supreme Court clarify whether an employer may discriminate against an employee, and mask that discrimination under the auspices of a generically broad definition of a classification of jobs. For these reasons, review by this Court is warranted. This Court should grant certiorari to review these important matters, reverse the Fourth Circuit's decision and remand the case for a trial of the merits.

Dated: December 4, 2001

Respectfully submitted,

Ann K. Crenshaw
Counsel of Record
Thomas M. Lawson
LAWSON AND SILEK, P.L.C.
P.O. Box 2740
Winchester, VA 22604
Telephone: (540) 665-0050

Counsel for Petitioner

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Entered: September 5, 2001]

No. 01-1196

RICHARD M. STUMBO,
Plaintiff-Appellant,

v.

DYNCORP PROCUREMENT SYSTEMS, INCORPORATED, formerly known as DynCorp Aerospace Operations, Incorporated; DYNCORP AEROSPACE OPERATIONS, INCORPORATED; DYNCORP AEROSPACE OPERATIONS (U.K.), LIMITED,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Virginia, at Harrisonburg.
Jackson L. Kiser, Senior District Judge.
(CA-00-7-5)

Submitted: August 10, 2001
Decided: September 5, 2001

Before WILKINS and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Thomas Moore Lawson, Ann K. Crenshaw, LAWSON & SILEK, P.L.C., Winchester, Virginia, for Appellant. Michelle L. Bodley, Steven W. Ray, Edward Lee Isler, RAY & ISLER, P.C., Vienna, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Richard M. Stumbo appeals the district court's order granting the Defendants' motion for summary judgment on Stumbo's Americans with Disabilities Act (ADA) claim. See 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 2000). We affirm.

The only question on appeal is whether Stumbo forecast sufficient evidence that Defendants regarded him as disabled to survive a motion for summary judgment. Applying the Supreme Court's decisions in Sutton v. United Airlines, 527 U.S. 471 (1999), and Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999), we conclude that he did not. Stumbo has demonstrated only that Defendants considered him unfit for one particular job. See Sutton, 527 U.S. at 492 (stating that to make out an ADA claim, a person must be regarded as "precluded from a broad range of jobs"); Murphy, 527 U.S. at 523 (holding that "to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job").

Accordingly, we affirm the grant of summary judgment in the Defendants' favor. We dispense with oral argument because the facts and legal contentions are adequately represented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

[Entered: January 29, 2001]

RICHARD STUMBO,	)	
	)	**Case No. 5:00CV0007**
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
DYNCORP TECHNOLOGY	)	
SERVICES, INC.,	)	**By: Jackson L. Kiser**
	)	**Senior United States**
Defendant.	)	**District Judge**
	)	

Before the Court is Defendant's Motion for Summary Judgment on all three claims in Plaintiff's suit under the American with Disabilities Act, 42 U.S.C. § 12101, *et seq.* For the reasons stated in the attached Memorandum Opinion, I **GRANT** Defendant's Motion in its entirety.

The Clerk is directed to send certified copies of this Order to all counsel of record. Any pending motions are to be dismissed as moot and the clerk is directed to strike this case from the docket.

Entered this 29th day of January, 2001.

/s/_____
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

[Entered: January 29, 2001]

RICHARD STUMBO,	)	
	)	**Case No. 5:00CV0007**
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM**
	)	**OPINION**
	)	
DYNCORP TECHNOLOGY	)	
SERVICES, INC.,	)	**By: Jackson L. Kiser**
	)	**Senior United States**
Defendant.	)	**District Judge**
	)	

In 1990, Plaintiff Richard Stumbo ("Stumbo") retired from his twenty-one year employment as a police officer. A year later, Stumbo was diagnosed with high blood pressure, which has since been treated with medication without incident. Stumbo has experienced no physical limitations due to his high blood pressure. Over the past decade, he has held an assortment of investigative and / or security positions around the world. These positions have often been quite strenuous, frequently requiring Stumbo to work between fourteen and sixteen-hour days for months at a time.

In early-1996, Defendant Dyncorp Technology Services, Inc.[1] ("Dyncorp") secured a contract with the U.S. Department of State to provide International Police Monitors ("IPMs") in Bosnia as part of United Nations operations in that region. The United Nations, not Dyncorp, determined both the geographic region to which an IPM would be assigned and the duties he would perform. In Bosnia, the terrain is mountainous; obtaining transportation is difficult; the availability of running water, refrigeration, and electricity are erratic; and food supplies are limited.

In April 1996, Stumbo submitted a resume to Dyncorp in reference to the IPM position. On August 12, 1996, Dyncorp conditionally accepted Stumbo's application, so long as he satisfactorily complete a medical examination and return various informational forms. Within a week, Stumbo had his physician, Dr. Mark Vickers ("Vickers"), perform a physical examination. On the medical examination form, Vickers classified Stumbo as "fit for all physical and manual duties" and prescribed Stumbo six months of medication for his hypertension.

As a course of practice, Dyncorp referred Stumbo's medical records to Peter McDougall ("McDougall"), Ph.D., for review of the medical examination. Dyncorp undertook this additional screening process in response to questions from its employer regarding the physical fitness of the some of

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[1] The names of Defendant are rather slippery in this case. Plaintiff apparently names a fictitious entity in the Complaint and Defendant itself has changed its name in the past few years. Regardless, the correct entity is Dyncorp Technology Services, which will be referred simply as "Dyncorp" throughout this opinion.

the IPMs. Although no additional examination was undertaken, Dr. McDougall concluded upon reviewing Stumbo's examination: "Overweight smoker on two hypertensive meds. Wouldn't recommend for strenuous work." After receiving this note, Dyncorp informed Stumbo on September 9, 1996 that he would not be hired as an IPM in Bosnia. In discovery, Dr. McDougall today contends that, if he were to re-examine Stumbo's application today, he would not make any comment regarding the hypertensive condition whatsoever.

Stumbo filed a Complaint with the Equal Employment Opportunity Commission in early 1997. On July 7, 1998, the EEOC issued its Determination. Plaintiff subsequently brought a suit under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), alleging three claims: that he was subjected to discrimination on the basis of disability, § 12102(2)(A); that Defendant improperly regarded him as disabled, § 12102(2)(C); and that Defendant failed to provide a reasonable accommodation for the hypertension, § 12112(b). Defendant has moved for summary judgment on all counts. In light of the recent guidance from the United States Supreme Court in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), I find for Defendant and grant the Motion in its entirety.

Legal Standard

Summary judgment is appropriate where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of a material

fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In making this determination, "the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994) (citations omitted), *cert. denied*, 513 U.S. 813 (1994); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1129 (4th Cir. 1987). Nevertheless, where the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, then no genuine issue exists for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Discussion

Each of Plaintiff's three claims is flawed. Turning to the first, the claim of disability under § 12102(2)(A), Plaintiff has the burden of proving that he possesses "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." § 12102(2)(A). Plaintiff's failure to make any such showing is fatal to his first claim.

In making this determination, I note that the facts and legal analysis of this matter are quite analogous to those in *Sutton*, 527 U.S. 471, and virtually identical to those in *Murphy*, 527 U.S. 516. In *Murphy*, a hypertensive mechanic was dismissed from his job because of his high blood pressure. It is important to note that the hypertension of the Plaintiff in *Murphy*, just as that of the Plaintiff in this matter, was correctable via medication. In both *Murphy* and *Sutton*,

the Court took into account the effect of "taking measures to correct for, or mitigate, a physical or mental impairment...when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Id.* The Court in *Murphy* thus affirmed summary judgment because the correctably hypertensive Plaintiff was unable to prove as a matter of law that he "is substantially limited in one or more major life activities and thus disabled under the ADA." *Murphy*, 527 U.S. at 521; *cf. Sutton*, 527 U.S. at 482 (dealing with correctable myopia).

The clear indication from these cases is that Plaintiff Stumbo's claim under § 12102(2)(A) is unsustainable as a matter of law. In this case, Stumbo's hypertension is fully correctable; he is not precluded from any of life's major activities, not even working. Plaintiff adduces no evidence that he cannot participate in the major lifetime activity of working: he only demonstrates that he was not hired to be an IPM by Defendant. Indeed, he has had many different jobs related to security and protection while he has had the hypertensive condition. As such, I find that Plaintiff does not possess a disability as contemplated under § 12102(2)(A).

Turning to Plaintiff's second claim, that Defendant "regarded him as disable" in contravention of § 12102(2)(C), I find this issue also to be largely resolved by the opinions in *Murphy* and *Sutton*. To be regarded as substantially limited in the major life activity of working, Plaintiff must demonstrate that he is disabled and unable to perform a *class* of jobs. "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 CFR § 1630.2(j)(3)(i); *Murphy*,

527 U.S. 523. There is no evidence that Defendant did not regard Plaintiff as able to work in any such class of jobs - Dyncorp merely found Plaintiff unable to work as an IPM in the war-torn region of Bosnia.[2] Indeed, in oral argument, counsel for Dyncorp expressed to the Court the firm's confidence that Plaintiff would make a fine police monitor, policeman, security guard, and so forth in any region but Bosnia. Stumbo's employment history corroborates this finding, as he continued to participate in the field of security monitoring and police work for several years after his diagnosis with hypertension. As such, Plaintiff fails to demonstrate as a matter of law that Defendant regarded him as having a disability that limited him in any life activity. Accordingly, the claim under § 12102(2)(C) necessarily fails.

Lastly, Plaintiff's accommodation claim fails because he cannot demonstrate that he is "an otherwise qualified individual with a disability" under the ADA. Moreover, I cannot conceive of any reasonable manner by which Defendant could have accommodated the working conditions of Bosnia to the medical needs of the Plaintiff. *Myers v. Hose*, 50 F.3d 278, 280-82 (discussing the need for practicality in adapting work

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[2] Plaintiff contends that the proper class of jobs in his case is that of IPM. Much as the Supreme Court did in *Murphy* and *Sutton*, I reject this exceedingly narrow classification. The *Sutton* Court found global airline pilot not to constitute the proper class of job, but rather to be in the same classification as regional airline pilot and pilot instructor. *Sutton*, 527 U.S. at 493. Similarly, the Murphy Court found mechanic to be in the same job classification as gas-engine repairer and gas-welding equipment mechanic, among others. *Murphy*, 527 U.S. at 524-25. Following that precedent, I find many other jobs, such as security monitoring and investigatory work, also to utilize Plaintiff's specialized skills.

environments). In other words, Stumbo has not demonstrated any disability triggering the ADA's requirement of accommodation; nor has he shown any possible means of accommodation. As such, the failure to accommodate claim necessarily fails. See *Shiflett v. GE Fanuc Automation Corp.*, 960 F. Supp. 1022 (W.D. Va. 1993).[3]

Conclusion

Plaintiff's case fails legally in all regards. The initial problem is the lack of any disability under the ADA, as his condition is correctable via medication. Moreover, Plaintiff puts forth no evidence that Defendant regarded him as substantially limited from a life activity. Lastly, Plaintiff shows no need, nor reasonable means, for accommodation by Defendant. As such, I grant Defendant's Motion for Summary Judgment as to all of Plaintiff's claims.

Entered this 29th day of January, 2001.

/s/_____
Senior United States District Judge

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[3] I also note that the record indicates that Plaintiff also was apparently neglectful in requesting accommodation. *See* 29 CFR § 1630.9; *Tangires v. The Johns Hopkins Hosp.*, 79 F. Supp.2d 587, 597 (D. Md. 2000).

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dallas District Office

[Entered: July, 7, 1998]

207 S. Houston Street
Dallas, TX 75202-4726
PH: (214) 655-3355
TDD (214) 655-3363
FAX (214) 655-3443

CHARGE NO: 310 97 1107

Mr. Richard M. Stumbo — **Charging Party**
M. W. Kellog
6458/DZBH
Post Office Box 4522
Houston, TX 77210-4522

DynCorp — **Respondent**
2000 Edmund Halley Dr.
Reston VA 20191-3436

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title I of the Americans with Disabilities Act (ADA) of 1990.

All requirements for coverage have been met. Charging Party alleged that he was discriminated against in violation of the statute in that Respondent withdrew the offer of a position as police monitor after Respondent reviewed his medial documents.

Respondent provides technical services to the United States and foreign government agencies and commercial customer worldwide. The evidence shows that in March 1996, Charging Party applied for the position of police monitor in Bosnia. On March 30, 1996, Respondent requested and Charging Party submitted biographical data. On August 12, 1996, Respondent notified Charging Party by telephone that he had the police monitor position, and that he was going to Bosnia. Charging Party was told his leave date was August 21, 1996, and that a preemployment package was being Federal Expressed. Charging Party completed all the forms, including a physical examination form completed by his doctor and returned them to Respondent. Charging Party was notified his leave date was moved to September 16, 1996, due to the Bosnia election.

On September 6, 1996, Respondent called Charging Party to tell him there was a problem with his physical examination, and requested that Charging Party contact them on September 9, 1996, concerning the problem with his physical examination. On September 9, 1996, Charging Party was told he was rejected for the police monitor position, because he had high blood pressure and hypertension.

Respondent contends that individuals recruited and hired as police monitors are governed by the terms of a foreign service employment agreement signed by all hires. Respondent states that the State Department regulations required all personnel to submit to a pre-employment screening process that insures they are in excellent physical and mental condition. One of the qualifications listed for hire is that Police Monitors must be in "good physical and mental condition with

no health deficiencies, either temporary or permanent". Respondent asserts that Charging Party was ground to be medically incapable of performing in the position of police monitor based on the assignment of individuals in a country ravaged by war, and job requirements for the position of police monitor.

The evidence shows that the U.S. State Department lists as one of the qualifications that police monitors must be in "good physical and mental condition with no health deficiencies, either temporary or permanent". The Respondent cannot defend its discriminatory practice by referring to the State Department's list of qualifications, since such requirements do not rise to the level of federal law.

The Evidence shows Respondent withdrew the offer of a police monitor position, because Respondent found Charging Party to be medically incapable of performing after a review of Charging Party's medical documents revealed Charging Party had hypertension, but Charging Party was given medical clearance by his doctor for the assignment in Bosnia.

Respondent concluded Charging party was found to be medically incapable of performing because Charging Party has hypertension, and withdrew the offer of employment. Respondent never requested a medical examination by its doctor. Charging Party's doctor concluded from his medical examination that Charging Party was medically capable of performing the job of police monitor. Respondent perceived Charging Party to be substantially limited in his ability to perform the duties of police monitor because of his impairment, and thus placed Charging Party in the category of an individual who did not meet the minimum qualifications set out in its contract with the U.S. State Department.

29 C.F.R. Section 1630.6 prohibits an employer from participating in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's own qualified applicant or employee with a disability to the discrimination prohibited by the statute.

Accordingly, there is reasonable cause to believe Respondent discriminated against Charging Party in violation of the ADA, by failing or refusing to hire Charging Party because of his record of disability, or because he was regarded as a person with a disability.

Section 107 of Title I of the Americans with Disabilities Act requires that if the Commission determines there is reasonable cause to believe that the charge is true, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Having determined there is reasonable cause to believe the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the Commission during the conciliation process with be made in accordance with Section 107 of Title I and Section 1601.26 of the Commission's Procedural Regulations. If the Respondent declines to enter into settlement discussions, or if the Commission's representative for any other reason is unable to secure a settlement acceptable to the Commission, the Director shall so inform the parties in writing and advise them of the court enforcement procedures available to the Charging Party and the Commission.

On Behalf of the Commission

07-07-98 /s/ _____

Date Jacqueline R. Bradley
District Director

(2)

No. 01-1014

Supreme Court, U.S.
FILED
FEB 11 2002
CLERK

In The Supreme Court of the United States

RICHARD M. STUMBO,

Petitioner,

v.

DYNCORP PROCUREMENT SYSTEMS, INCORPORATED, f/k/a DynCorp Aerospace Operations, Incorporated; DYNCORP AEROSPACE OPERATIONS, INCORPORATED; DYNCORP AEROSPACE OPERATIONS, (U.K.), LIMITED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief in Opposition

Michelle Bodley Radcliffe
Counsel of Record
Steven W. Ray
Edward Lee Isler
RAY & ISLER, P.C.
8245 Boone Boulevard, Suite 402
Vienna, Virginia 22182
(703) 748-2690

Counsel for Respondents

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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RESPONDENTS' COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Where this Court has determined that an individual whose hypertension is controlled by medication and who is not limited in any major life activity is not "disabled" under § 12102(2)(A) of the Americans with Disabilities Act ("the Act"), *e.g.*, *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999), and where the district court and the Fourth Circuit, applying the legal analysis adopted in *Murphy*, made factual findings, based upon Petitioner's admissions, that Petitioner's hypertension is fully controlled by medication and does not substantially limit him in any major life activity, should this Court review the lower court's determination that Petitioner cannot recover under § 12102(2)(A) as a matter of law because he was not "disabled" as defined therein?

2. Is review by this Court warranted where, following this Court's decisions in *Murphy* and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the district court and the Fourth Circuit required Petition to present facts that Respondents "regarded" him to be "precluded from a broad range of jobs", *Murphy*, 527 U.S. at 523, *accord Sutton*, 527 U.S. at 492, and determined that, since that Petitioner's proof established only that Respondents considered him unable to perform the singular position of International Police Officer in Bosnia, Petitioner could not sub his claim under § 12102(2)(C) that Respondents regarded him as substantially limited in the major life activity of working?

LIST OF PARTIES

The following are parties to the proceedings in which the United States Court of Appeals for the Fourth Circuit issued the judgment that is under review:

Richard M. Stumbo -
Plaintiff/Appellant/Petitioner

DynCorp Procurement Systems, Inc. -
Defendant/Appellant/Respondent

DynCorp Aerospace Operations, Inc. -
Defendant/Appellant/Respondent

DynCorp Aerospace Operations (U.K.), Inc. -
Defendant/Appellant/Respondent

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

DynCorp Procurement Systems, Inc.

DynCorp Procurement Systems, Inc., has a parent corporation, DynCorp Information and Engineering Technology, and a grandparent corporation, DynCorp. Neither DynCorp Procurement Systems, Inc.'s parent or its grandparent are policy held companies owning 10% or more of DynCorp Procurement Systems, Inc.'s stock.

DynCorp Aerospace Operations, Inc.

DynCorp Aerospace Operations, Inc., has a parent corporation, DynCorp Technical Services, Inc., and a grandparent corporation, DynCorp. Neither DynCorp Aerospace Operations, Inc.'s parent or its grandparent are policy held companies owning 10% or more of DynCorp Aerospace Operations, Inc.'s stock.

DynCorp Aerospace, Operations (UK) Ltd.

DynCorp Aerospace Operations (U.K.), Inc., has a parent corporation, DynCorp Aerospace Operations, Inc., a grandparent corporation, DynCorp Technical Services, Inc., and a great-grandparent, DynCorp. Neither DynCorp Aerospace Operations (U.K.), Inc.'s parent, grandparent or great-grandparent are policy held companies owning 10% or more of DynCorp Aerospace Operations (U.K.), Inc.'s stock.

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OPINIONS AND ORDERS ENTERED BELOW

The United States District Court for the Western District of Virginia granted summary judgment in Respondents' favor on all counts of Petitioner's Complaint in an opinion dated January 29, 2001 and published at 130 F. Supp.2d 771. The district court's opinion is reproduced in full in the Appendix to the Petition for Writ of Certiorari at App. 5.

The United States Court of Appeals for the Fourth Circuit issued an unpublished per curiam opinion dated September 5, 2001, affirming the decision of district court. The appellate court's opinion is reproduced in full in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1.

JURISDICTION STATEMENT

The judgment of the court of appeals was entered on September 5, 2001. The Petition for Writ of Certiorari was filed on December 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Petitioner's claims arise under the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12101, *et seq.* The statute at issue in this appeal is § 12102(2), which is set forth in full in the Petition for Writ of Certiorari at 1-2. The federal regulation related to Petitioner's claims is 29 C.F.R.§ 1630.2(j), also set forth in the Petition for Writ of Certiorari at 2-3.

STATEMENT OF THE FACTS

Petitioner's Statement of the Facts and Argument are replete with assertions that misrepresent the facts in the record and assertions that have no foundation in the record. Accordingly, Respondents' Statement of the Facts and Argument correct and supplement the Petitioner's unsupported representations with record facts (and, where necessary, citations to particular pages of the Joint Appendix filed with the Fourth Circuit as reproduced in the Appendix hereto) where such misrepresentations may have a bearing on what issues would properly be before the Court if certiorari were granted.

1. The Parties

Since his retirement from the Metropolitan D.C. police force in 1990, after 21 years of service, Petitioner has been employed in several domestic and international security and/or investigative positions that have required him to be on his feet most of the time, and that have sometimes required 8-16 hours of work per day for one to three months with no days off. Since 1997, Petitioner has worked for W.M. Kellogg Co. as a security coordinator in Algeria. In this position, Petitioner works primarily on his feet for fourteen hours a day, seven days a week, for two months at a time providing security measures for employees working on a natural gas renovation project.

Respondent DynCorp Aerospace Operations (U.K.), Ltd. ("DAOL") is incorporated under the laws of the United Kingdom. DAOL employs persons hired as International Police Monitors ("IPMs") under a contract between DynCorp Aerospace Operations,

Inc. and the U.S. State Department. DynCorp Aerospace Operations, Inc. recruited persons to serve as IPMs in Bosnia. Respondents shall hereafter be referred to as "DynCorp."

2. Petitioner's Hypertension

In or around 1991, Petitioner was diagnosed with high blood pressure, otherwise known as hypertension. His hypertension "has been treated with medication without incident." Appendix to the Opposition (Opp. App.) 11. Petitioner admitted during discovery that he has had no physical limitations as a result of his high blood pressure. Opp. App. 7-9, 11.

3. DynCorp's Contract To Provide International Police Monitors In Bosnia

Under its contract with the State Department, DynCorp provided highly qualified law enforcement personnel to work in Bosnia as part of the United Nations International Police Task Force ("IPTF"). IPTF personnel were responsible for reconstituting, establishing and maintaining the rule of law and gaining public confidence in areas where the civilian police force was not fully functional during the Bosnian conflict. Their duties included, *inter alia*, monitoring and evaluating law enforcement activities, conducting on-the-job training for law enforcement personnel, assessing threats to public order and advising how to deal with such threats, and assisting in normal daily law enforcement activities.

Although DynCorp recruited the IPMs, once they reported to Bosnia they were subject to the direction of the United Nations. The United Nations,

not DynCorp, determined both the geographic location to which an IPM would be assigned and the duties he or she was to perform. Moreover, IPMs in Bosnia were charged with finding their own housing. In 1996, living conditions throughout Bosnia were unpredictable and often strenuous. The terrain was mountainous, obtaining transportation was difficult, the availability of running water, refrigeration and electricity was erratic, and food supplies were limited.

4. Petitioner's Application For IPM In Bosnia

Petitioner applied with DynCorp for the IPM position in Bosnia in spring 1996. Petitioner understood throughout the application process that he would have to pass a physical examination before he could be finally selected for the IPM position. Opp. App. 2.

On or about August 12, 1996, DynCorp informed Petitioner that he had been conditionally accepted for the IPM position in Bosnia, and that he would be receiving forms, including a physical examination form, to be completed before he was hired.[1] Opp. App. 3, 19. Petitioner thereafter received from DynCorp information regarding the IPM position, including a Foreign Service Employment Agreement ("FSEA") and a medical examination form. Opp. App. 19-22. Petitioner also received a letter advising that the

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[1] Petitioner's assertion that DynCorp notified him on August 12, 1996 "that he had been selected for the position of IPM", Pet. 6, is misleading because, as noted above, DynCorp advised Petitioner that his employment was conditioned upon the successful completion of the medical exam. *See* Opp. App. at 3, 19, 21.

employment offer described in the FSEA was contingent on satisfactory results of, among other things, a pre-employment medical examination. Opp. App. 21.

Petitioner's physician, Dr. Mark Vickers, examined Petitioner and completed the requisite pages of the physical examination form. Petitioner shared with Dr. Vickers his understanding of the duties and responsibilities of an IPM in Bosnia, and Dr. Vickers did not express any concern regarding Petitioner's ability to meet the requirements of the job. On the examination form, Dr. Vickers classified Petitioner as "[f]it for all physical and manual duties."

5. DynCorp's Review Of Petitioner's Application

At the time Petitioner applied, DynCorp forwarded the medical examination forms of all IPM applicants to Dr. Peter McDougall. DynCorp had entered into an agreement whereby Dr. McDougall reviewed each medical examination form completed and returned to DynCorp by the applicants' physicians. Opp. App. 24. DynCorp provided to Dr. McDougall a summary of the responsibilities and tasks associated with the IPM position and a description of the conditions in Bosnia under which the IPMs could be performing those tasks, and he considered the job requirements and the conditions in Bosnia when determining whether an applicant could perform the job. Opp. App. 13-14, 25-28. DynCorp secured a review of the medical exams to ensure that IPMs would be physically able to perform the tasks required of an IPM in Bosnia. Opp. App. 13.

After examining Petitioner's medical examination form, Dr. McDougall wrote a note to DynCorp in which he stated: "Overweight smoker on two hypertensive meds. Wouldn't recommend for strenuous work."[2] Opp. App. 29. Upon receiving this note, Austin Bryan, a DynCorp recruiter, notified Petitioner on or about September 6, 1996 that he should stop making preparations to go to Bosnia until a final decision was reached regarding his application. Mr. Bryan explained to Mr. Stumbo that a physician had reviewed his medical records and advised that he may not be medically suited for the job environment in Bosnia. Opp. App. 30.

After reviewing further Petitioner's application, the medical examination performed by Dr. Vickers, and the comments by Dr. McDougall, DynCorp determined that the combination of Petitioner's weight, smoking and hypertension raised questions about his abilities to perform the duties of an IPM in Bosnia.[3] Opp. App. 17. Petitioner thereafter was informed that

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[2] This evidence contradicts Petitioner's assertion, Pet. 8, that Dr. McDougall advised DynCorp that Petitioner "was medically incapable of performing" the IPM job, and that "he perceived [Petitioner] as medically incapable of performing the job."

[3] Contrary to Petitioner's claim, Pet. 6, the record contains no evidence that "DynCorp found [Petitioner] to be medically incapable of performing the position of IPM in Bosnia" or that "DynCorp withdrew the offer of IPM" only because Petitioner's medical documents revealed that he had hypertension. Similarly, Petitioner's contentions at Pet. 7 that DynCorp "perceived [him] to be substantially limited in his ability to perform the duties of an IPM because of a perceived impairment" and that the company "placed [him] in the category of an individual who did not meet the job requirements of an IPM because of his hypertension" are also without foundation in the record.

he would not be hired as an IPM in Bosnia. Petitioner never asked DynCorp for any kind of an accommodation for a disability, and DynCorp never informed Petitioner that it would not provide one.

6. DynCorp's Invitations to Petitioner To Apply For Other Similar Positions

Within a few weeks after he had been rejected for the IPM position in Bosnia, Petitioner called DynCorp to inquire whether other jobs for which he might be qualified were available. The DynCorp recruiter with whom he spoke replied that she would check to see if there were such openings and she asked him to call back. Opp. App. 4-5. Another DynCorp employee later informed Petitioner that he should reapply for the Bosnia IPM position. Opp. App. 5. DynCorp also discussed with Petitioner the possibility of his applying for an IPM job in Haiti, a position that required employees to speak fluent French or Creole. Opp. App. 5-7.

ARGUMENT

The lower courts' decisions were based upon two factual findings. The first, that Petitioner's hypertension does not limit him in any major life activity, was the basis for the legal conclusion that he was not "disabled" within the meaning of § 12102(2)(A) of the Act. The second factual finding was that the undisputed facts established that DynCorp regarded Petitioner as unable to perform one job only, the IPM position in Bosnia. To these facts, the courts below applied the legal standards adopted by this Court and adhered to by the circuit courts.

Because the Petition raises no legal issues that this Court has not previously addressed, the Court should deny Petitioner's request that it revisit the factual determinations made by the district court and the Fourth Circuit.

1. Certiorari Is Not Warranted On Petitioner's Claim Under § 12102(2)(A) Of The ADA Because This Court Has Already Addressed The Very Legal And Factual Issues Presented.

Petitioner claims he is "disabled" as that term is defined under § 12102(2)(A) of the ADA. In order to establish that he is disabled under that provision, he must establish that he has a "physical or mental impairment" that "substantially limits" him in one or more of his "major life activities". *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *accord Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 122 S. Ct. 681, 689 (2002) ("Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."). Assuming *arguendo* that Petitioner has identified a physical impairment (hypertension) that affects a major life activity (working),[4] the lower courts nonetheless correctly held that he cannot show that this

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[4] This Court has recognized "the conceptual difficulties inherent in the argument that working could be a major life activity," *Toyota Motor Mfg.*, 122 S. Ct. at 692, and has expressed doubts as to whether "working" is an appropriate major life activity under the ADA. *See Sutton*, 527 U.S. at 492. DynCorp submits that working, generally stated, should not be considered a major life activity under the ADA and requests that the Court consider this issue if the Petition is granted.

impairment served as "substantial limitation" on his major life activity of working because his hypertension is fully treatable with medication and does not limit him in any activity. As explained below, Petitioner's argument thus is governed by and flatly contrary to this Court's holding in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999).

In determining whether an individual's impairment "substantially limits" a major life activity, this Court has held that his ability to mitigate, or successfully cope with, the effects of the disability must be taken into account. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999); *Murphy*, 527 U.S. at 521. The undisputed facts, including repeated representations by Petitioner and his physician, establish that Petitioner's hypertension is well controlled with medication. *See, e.g.*, Pet. 5 ("[a]lthough his physical impairment, hypertension, continues to be successfully treated with prescription medication . . . .") and 14 ("[w]hile Mr. Stumbo has been able to control his hypertension with medication . . . ."). The record, moreover, is replete with facts and Petitioner's admissions that his hypertension does not limit him in any way, including in his ability to perform any major life activity. *See* Opp. App. 8-9 ("Q: Is there any activity that you're incapable of doing because of your high blood pressure? A: That I'm incapable of doing? No, not that I know of, no. Q: Is there any - does your high blood - blood pressure limit you from engaging in any kind of activity in any way? A: No.").

The speciousness of Petitioner's request that this Court review the lower courts' determination that his "well-controlled" hypertension does not render

him "disabled" under § 12102(2)(A) is reflected by the fact that this Court already specifically addressed whether an individual whose hypertension is controlled by medication is "disabled" under § 12102(2)(A) in *Murphy*. In that case, the plaintiff's mechanic job required him to drive commercial vehicles. He was fired because his employer believed his high blood pressure would preclude him from obtaining a Department of Transportation health certification, which is required for drivers of commercial vehicles. 527 U.S. at 519-20. This Court upheld the dismissal of Murphy's § 12102(2)(A) claim, holding that because his hypertension, when treated with medication, did not limit him in any major life activity, he was not disabled under § 12102(2)(A) as a matter of law. *Id.* at 521.

Relying on *Murphy*, the district court – not surprisingly given that the undisputed facts related to Petitioner's hypertension were virtually identical to those in *Murphy* – concluded that Petitioner was not disabled under § 12102(2)(A).[5] The courts below clearly applied the appropriate legal standard adopted by this Court.

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[5] Contrary to Petitioner's contention, *see* Pet. 15, DynCorp did not argue below – and it does not contend now – that hypertension treated with medication can never be a "disability" under the Supreme Court's holdings in *Sutton* and *Murphy*. Nor did the lower courts adopt a *per se* classification that persons whose hypertension is medicated will never be "disabled" under the ADA, as Petitioner asserts at Pet. 24. Rather, as explained above, the Court's rulings in these cases confirm only that persons like Petitioner, whose hypertension is controlled by medication *and* who suffer no substantial limitation in any major life activity as a result of their controlled hypertension, are not "disabled" under § 12102(2)(A). *E.g., Sutton* 527 U.S. at 488; *Murphy*, 527 U.S. at 521.

Given the inescapable conclusion that his controlled hypertension does not substantially limit him in any manner, Petitioner asks the Court to speculate that he would, in fact, suffer from substantial limitations if his hypertension medication were unavailable to him. *See* Pet. at 16 ("it is important to consider Stumbo's hypertensive condition in totality - with and without medication - in determining whether he qualifies as disabled"). Petitioner's conjecture regarding his condition in an unmedicated state is also flatly contrary to existing Supreme Court precedent.

In *Sutton*, this Court expressly considered the issue Petitioner poses - *i.e.*, whether Petitioner's hypertension must be examined in an unmedicated state, Pet. 16 - and answered in the negative. In fact, in *Sutton*, this Court stated that evaluating plaintiffs "in their hypothetical uncorrected state - is an impermissible interpretation of the ADA." 527 U.S. at 482. This binding authority forecloses Petitioner's invitation to the Court to engage in speculation by considering his hypertension in its unmedicated state.

Finally, Petitioner's assertion that the district court erred by not "consider[ing] the specific factual issues of this particular case", Pet. 16, is belied by that court's observation that record conclusively established that Petitioner's "hypertension is fully correctable; he is not precluded from any of life's major activities, not even working."[6] Pet. App. 9. This factual

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[6] Indeed, Petitioner's claim that the district court "wholly adopted DynCorp's assertion of the facts and totally dismissed the facts" presented by Petitioner, Pet. 5, is blatantly false. The district court properly looked to the undisputed evidence in the record as the basis for its decision.

determination is not subject to further review, lest the Court sit as a court of error correction. *E.g.*, *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980) (declining to review factual findings "[i]n view of [the Court's] settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred").

2. Petitioner's Assertion That The Position Of International Police Monitor Is A "Class Of Jobs" Contravenes The Applicable Legal Standard Identified By This Court In *Sutton* And *Murphy*.

Petitioner further asserts that the lower courts erred when they applied the legal standards adopted in *Sutton* and *Murphy* to the record facts and concluded that Petitioner had not established that DynCorp "regarded" him as unable to perform the major life activities of working because he had not shown that DynCorp perceived him to be unable to perform a broad range or class of jobs. Pet. 23. The district court and the Fourth Circuit, however, appropriately applied the expansive view of a "class of jobs" advocated by this Court in *Sutton* and *Murphy* to the undisputed facts. Their determination that Petitioner is not "regarded as disabled" under § 12102(2)(C) thus must stand.

"[A] person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." *Murphy*, 527 U.S. at 521-22 (citing *Sutton*,

527 U.S. at 489). Petitioner claims DynCorp "regarded" his hypertension as substantially limiting him in the major life activity of "working". Addressing similar assertions in *Sutton* and *Murphy*, this Court held that a plaintiff alleging that an employer "regarded" his ability to work as "substantially limited" must show that the employer perceived him as "'significantly restricted in the ability to perform either a *class of jobs* or a *broad range of jobs in various classes* as compared to the average person having comparable training, skills and abilities.'" *Sutton*, 527 U.S. at 491 (*quoting* 29 C.F.R. § 1603.2(j)(3)(i)) (emphasis added). "[T]o be regarded as substantially limited in the major life activity of working, one must be *regarded as precluded from more than a particular job.*" *Murphy*, 527 U.S. at 523 (emphasis added).[7]

In this regard, *Sutton* and *Murphy* again are instructive. In *Sutton*, the plaintiffs, who suffered from severe myopia, alleged that United Airlines perceived their myopia as disqualifying only for global pilot positions, a singular job. This Court therefore held that the plaintiffs had failed to allege that United Airlines regarded them as unable to perform a "class of employment." 527 U.S. at 493. The plaintiff in *Murphy* was fired because UPS believed his high blood pressure would prevent him from obtaining a Department of Transportation certification required for driving commercial vehicles. This Court rejected the plaintiff's "regarded as" disabled claim, holding that UPS's knowledge of Murphy's high blood pressure and its conclusion that he was unable to perform the

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[7] Citing 29 C.F.R. § 1630.2(j)(3)(i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").

particular job of driving a commercial vehicle was "insufficient, as a matter of law, to prove that [Murphy] is regarded as substantially limited in the major life activity of working." 527 U.S. at 525.

The decision in *Bridges v. City of Bossier*, 92 F.3d 329, 333-34 (5th Cir. 1996), upon which Petitioner relies, also bolsters DynCorp's position. In *Bridges*, the defendant perceived the plaintiff to be unable to perform any job in which he would be routinely exposed to extreme trauma. The court thus determined that, to show that the defendant "regarded" him as substantially limited in the major life activity of working, the plaintiff had to produce evidence from the record that showed how many and which jobs involved the routine exposure to extreme trauma. *Id.* at 333. The plaintiff in *Bridges* failed to make the requisite factual showing.[8] *Id.*

The lower courts correctly applied the foregoing analysis to the undisputed facts. The record is clear that DynCorp considered Petitioner's hypertension only insofar as it, in combination with his smoking and weight, raised doubts about his ability to perform the tasks of a specific job, International Police Monitor, in a

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[8] Another decision Petitioner relies on is *Coleman v. Southern Pacific Transportation Co.*, 997 F. Supp. 1197 (D. Ariz. 1998), which also applies the same legal standard. (Indeed, Petitioner does not cite any circuit court that has not applied this standard since the decisions in *Sutton* and *Murphy*.) Because the plaintiff in *Coleman* produced abundant evidence showing that the defendant *actually considered* his condition to limit him from working in an entire class of transportation jobs, the court held that he had produced proof creating a genuine issue of fact as to whether the defendant perceived him as substantially limited in the major life activity of working. *Id.* at 1206.

specific location, Bosnia. *See* Opp. App. 17. Central to DynCorp's determination about the potential limitations of Petitioner's overall medical condition was the fact that he would have to perform the job in the war-torn country of Bosnia, which had severe geological and weather conditions and unreliable electricity, transportation and medical services.[9] Here, proof that DynCorp even thought about whether Petitioner's hypertension limited his ability to perform any job other than IPM in Bosnia is wholly absent from the record. DynCorp's consideration of Petitioner thus was undisputedly limited to the narrow and unique requirements of the IPM position in Bosnia. *See* Opp. App. 15-16. Petitioner's bald allegations that DynCorp determined him to be unable to perform an IMP's duties anywhere, Pet. 7, 13-14, and to be "'substantially limited' in his ability to perform duties as law enforcement and logistics personnel, Pet. 16, lack any record support. The facts thus fall far short of establishing that DynCorp believed Petitioner to be substantially limited in his ability to perform a class of jobs or broad range of jobs.

Lacking any record evidence that DynCorp considered him unable to perform the broad range or class of jobs relevant here, *i.e.*, national and international law enforcement and security, Petitioner asks this Court conclude that the job of International Police Monitor – in and of itself – comprises a "class of

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[9] In this regard, the record reflects that Petitioner's representation that DynCorp determined that he did not meet the requirements of an IPM solely "because of his hypertension", Pet. 7, is incorrect.

employment." Pet. 13. This argument is wholly unsupported by the governing regulations cited in *Sutton* and *Murphy*, which state that factors to consider in determining whether one is substantially limited in his ability to work include "the number and types of jobs utilizing similar training, knowledge, skills or abilities, within [the] geographic area [reasonably accessible to the individual], from which the individual is also disqualified." 29 C.F.R. § 1630.2(j)(3)(ii)(B). "If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different jobs are available, one is not precluded from a broad range of jobs." *Sutton*, 527 U.S. at 492. Petitioner's training, knowledge, skills and abilities readily enable him to perform any number of jobs in the law enforcement and security field, including the job of security coordinator in Algeria, which he has held since 1997. Because Petitioner does not and cannot show that other jobs "utilizing [his] skills" are not available to him, his "regarded as" claim fails.

Having developed no evidence that DynCorp regarded him as unable to perform any police monitoring, law enforcement or security job other than the IPM job in Bosnia, Petitioner raises several unfounded arguments - and in so doing, misrepresents the facts in the record - in hopes of salvaging his "regarded as disabled" claim. First, he baldly claims that DynCorp "perceived" that he

> was medically incapable of performing major life activities required of IPMs such as, but not limited to, walking, running, lifting, climbing stairs, personal survival skills, ability to adapt to cold weather and defense of his personal safety. DynCorp believed that Mr. Stumbo was medically incapable of performing the broad range of jobs which include any non-sedentary activity such as walking, running, climbing stairs or any form of physical exertion.

Pet. 8. There are absolutely no facts in the record that DynCorp actually "perceived" any of the foregoing. Nor is there record evidence supporting Petitioner's assertions that Dr. McDougall "advised DynCorp that Mr. Stumbo was medically incapable of performing the job" of an IPM, Pet. 8; that DynCorp had "internal procedures" requiring either an independent review of Petitioner or a "follow-up by the candidate's own doctor", Pet. 18; or that "it is undisputed that [Petitioner] has the requisite skills and experience" to perform as an IPM, regardless of the location, if he had access to his medication. Pet. 18-19.

Second, Petitioner claims not only that DynCorp decided that he was unfit for the IPM job in Bosnia, but also that "DynCorp concluded that [his] impairment (with or without hypertensive medication) precluded him from obtaining any positions with DynCorp", Pet. 20 (emphasis in original); that DynCorp's decision not to hire him as an IPM in Bosnia "barred him . . . from all possible positions including Bosnia", *id.*; and that "DynCorp refused to consider [Petitioner] for any IPM

positions whether in Bosnia, Haiti or elsewhere". Pet. at 19. Petitioner does not and cannot provide record citations supporting these wholly speculative assertions. Indeed, the record facts suggest the opposite, as reflected by Petitioner's admission that, after denying him the IPM position in Bosnia, DynCorp invited him to seek other positions with the Company.[10] *See, e.g., Hooven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001) (defendant did not regard plaintiff as unable to perform the life activity of working where it sought to place plaintiff in another position).

Accordingly, Petitioner's unsupported *allegation* that DynCorp's perception of his impairment would have restricted him from "all IPM and related positions", Pet. 23, is meritless. In the lower court, Petitioner failed to establish what those "related positions" were, what their responsibilities included, and where and under what conditions they were to be performed. The Fourth Circuit thus correctly upheld the district court's factual determination that Petitioner "demonstrated only that Defendants considered him unfit for one particular job", Pet. App. 2, 10, a finding that, under the legal standards expressed in *Sutton* and *Murphy*, precludes Petitioner's recovery on his "regarded as" disabled claims. Accordingly, review by this Court is unwarranted.

---

[10] Petitioner testified that, after DynCorp denied him employment as an IPM in Bosnia, it extended him opportunities to apply for similar positions in other locations. Opp. App. 4-7. He also represented in a letter to Senator John Warner that DynCorp invited him to reapply for the Bosnia position or apply for other positions after he was denied the Bosnia IPM job. Opp. App. 32. These concessions flatly contradict the notion that DynCorp somehow perceived Petitioner to be limited in his ability to perform jobs other than the IPM job in Bosnia.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 11, 2001 Respectfully submitted,

Michelle Bodley Radcliffe
Counsel of Record
Steven W. Ray
Edward Lee Isler
RAY & ISLER, P.C.
8245 Boone Boulevard
Suite 402
Vienna, Virginia 22182
(703) 748-2690

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RICHARD M. STUMBO,
Plaintiff,

vs.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.,
DYNCORP AEROSPACE OPERATIONS, INC.,
and
DYNCORP AEROSPACE OPERATIONS
(U.K.), LTD.,
Defendants.

CIVIL ACTION NO. 5:00CV00007

Vienna, Virginia
Monday, November 6, 2000

Deposition of

RICHARD M. STUMBO

called for examination by counsel for the defendants, pursuant to notice, in the offices of Ray & Isler, 8245 Boone Boulevard, Suite 402, Vienna, Virginia 22182, commencing at 9:55 o'clock, a.m., before Richard Gordon, court reporter and Notary Public for the Commonwealth of Virginia, when were present on behalf of the respective parties:
Reported by: Richard Gordon

* * *

wouldn't tell me to call back every week. You know, I figured if there was something that they didn't - - that would disqualify me, that they would tell me not to call back because of whatever the reason might be.

Q. And at the time when you were having these conversations with Mr. Bryant, you understood that you would have to pass a physical at some point?

A. Yes.

Q. So to the extent that was still out there, you had not met that qualification yet?

A. No, I hadn't.

Q. Do you recall the names of anyone else that you spoke with at DynCorp up through August of 1996?

A. Yes, a Kristen - - I think her married name is Messer, M-E-S-S-E-R.

Q. When did you speak with Ms. Messer?

A. Most of the times when I called on the weekly basis, I was talking to her.

Q. Can you tell me how many times, approximately, you talked to Mr. Bryant during

* * *

* * *

A. Yes. They said it would be a contract, a physical, an information, information on actually what the job is, as far as what's expected of you, you know, and items they would issue to you, items they recommended you to take, that you had to purchase on your own, and also the kind of sequence of events.

In other words, you go to New York, you get the plane, you go to Zagreb, Croatia. And there you get a briefing on what you're to do, you know, get an assignment. Kind of a chronology of what was going to take place, you know.

Q. And you understood, at the end of those conversations on the 12th, that the offer you had been given was a conditional offer, subject to you completing the necessary paperwork and exams and forwarding that information back to DynCorp?

A. Right; yes.

Q. In this lawsuit you have alleged that DynCorp discriminated against you on the basis of a disability or perceived disability. Is it your contention that DynCorp discriminated against you

* * *

* * *

other jobs?

A. It wasn't - - it wasn't long. In other words, I don't remember exactly what date it was, but it may have been right after everybody left to go to Bosnia, because I went to the airport with them that day.

And I think, whatever date that was, September something, but they - - I had called and asked about other jobs. Okay, if I didn't qualify for this job, were there other jobs that I qualified for?

By this time I'm finding out a little bit about - - that DynCorp is a pretty big company. And I didn't realize that in the beginning. So I called and asked about other jobs, if there were any.

Q. Who did you call?

A. I remember talking to Lynn Holland then, because I hadn't talked to her in a long time. And I called and asked for Kristen, and she wasn't there. And I think I asked for Austin Bryant, too, and he wasn't there. And Lynn Holland was there. I remembered her from way back in the beginning. So - -

Q. What specifically did you ask Ms. Holland?

A. I told her about getting dropped from the Bosnia job because of the high blood pressure. And I asked her if there was any other jobs available with DynCorp. And I don't really remember her response, except that, you know, she said that DynCorp is a big company, and there may be other jobs. But for this project, it was, you know - - there was different projects going on.

I guess what I was asking her is, if there's another project going on, can you direct me there, a number or a person to call or something like that. So she was going to check on that for me. So I was, you know, basically - - I had to call back later.

Q. Okay. When you talked with Ms. Holland about other projects, what was the nature of those projects?

A. Well, I didn't know the nature. I was trying to find out what the nature was. You know, some projects may be projects I would not

* * *

Q. And did she ever get back to you about what, if any, other overseas jobs in a similar area there were?

A. No, because when I called again, she wasn't there. It was Kristen was there again. She talked to me about - - I'm not sure if it was that time or another time even - - about the Haiti job coming up. But I think it was a little early for that yet. But there was other things coming up, but nothing was real firm yet, nothing was definite. And then Kristen told me to reapply for the Bosnian job.

Q. Okay. So you are not sure at that time that Kristen talked about Haiti, because - -

A. I think it might have been another call or two after that call.

Q. Okay. But she said that other things might be coming up, but we are not certain. In other countries?

A. Yes. They had other contracts they were working on, but they didn't - - you know, they weren't finalized yet, and that I should keep my name in, if I was still interested, keep my name in there because things came up all the time.

And then she told me, "Well, why don't you just reapply for the Bosnia job? Because they still have openings."

Q. And what was your response when she asked you to reapply for Bosnia?

A. I was very surprised when she told me that. Why would I reapply when I just got turned down for it? I'd just get turned down again.

Q. Did you ask her that?

A. And she said, "Well, maybe this time you won't," or some words to that effect.

Q. What else did she tell you about there still being Bosnia openings?

A. I can't really remember anything else that we talked about. I just was very surprised about her saying that, that I should reapply. That wasn't even - - I didn't even ask her, "Hey, should I reapply?" Because I had put that aside. I thought that was done.

Q. When she said that, did you ask her, why would I reapply when I just got turned down?

* * *

sorry - - to Mr. Marcantel before or after you had been told you no longer met the requirements, that there had been this change in requirements?

(Pause.)

A. I think it was after, but I'm not positive. I think it was - - I'm - - I'm not real sure.

Q. Okay. And aside from sending a letter to Mr. Marcantel - -

A. Yes.

Q. - - after you were told you now r eded to be out of the service only five years to qualify as an international police monitor, did you have any other conversations with anyone from DynCorp about, "Is there another job you have that I can apply for", or "I want to apply for another job"?

A. Yes. I called somebody about - - later about the - - about the Haiti job, too, but I think there it was the same requirement, five years, which disqualified me right away even from applying. And also, they were, of course, looking for, you know, Creole or French speaking,

* * *

of that allegation, as I understood it, is high blood pressure. Am I correct that's your claim?

A. Yes.

(Pause.)

Q. Is it correct that your high blood pressure does not preclude you from performing the duties of a police monitor now, in your current job?

A. Well, my - - it's not a police monitor that I'm doing, but it's a similar - - yes, it's similar duties.

Q. Okay.

A. No, it doesn't prevent me from doing my job.

Q. Okay. And is the reason that your high blood pressure doesn't prevent you from doing your duties in that job because you're taking medication for it?

A. Yes.

Q. So the medications keep your high blood pressure at a level that allows you to perform the functions of your job?

A. That is correct.

Q. Okay. And is it your allegation that your medication would have allowed you to perform the duties of an international police monitor for DynCorp at an acceptable level?

A. Yes, it is.

Q. In response to interrogatory 12, and you can look at it if you want - - let's see what page it is.

A. Page nine, I think.

Q. Here we go. Nine, and continuing over to the top of page 10 that you make the contention there that, " I have had no physical limitation as a result of my high blood pressure." Is that an accurate statement?

A. Yes. I've never had any limitations.

Q. Is there any activity that you're incapable of doing because of your high blood pressure?

A. That I'm incapable of doing? No, not that I know of, no.

Q. Is there any - - does your high blood - - blood pressure limit you from engaging in any kind of activity in any way?

(Pause.)

A. No. I - - I guess I don't understand - -

Q. I - - I understand that you don't know the whole universe of - - of questions - - but on a

A. No, what I'm - - what I'm thinking about is does it limit me in - - in - - in what I can do, or - -

Q. On a day-to-day basis, does it limit you - -

A. On a day-to-day basis, no.

Q. Okay.

(Pause.)

You've mentioned several friends that have worked or work for DynCorp. Have you talked with any of them about your claims against DynCorp.

A. Let me think here.

MS. CRENSHAW: Current or - - or past?

BY MS. BODLEY:

Q. Current or past, either one?

A. Yes, I've talked to Steve Mann and Gary

* * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RICHARD M. STUMBO
Plaintiff,

v.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.
DYNCORP AEROSPACE OPERATIONS, INC.

and

DYNCORP AEROSPACE OPERATIONS
(U.K.), LTD
Defendants.

PLAINTIFF'S ANSWERS AND OBJECTIONS TO DEFENDANTS' FIRST SET OF INTERROGATORIES

COMES NOW the Plaintiff, Richard M. Stumbo, by counsel, and for his Answers and Objections to Defendants' First Set of Interrogatories states as follows:

* * *

12. If you claim that, at the time you applied with DynCorp for the police monitor position, you had high blood pressure and/or hypertension, describe in detail the nature of the your high blood pressure and/or hypertension, including but not limited to the length of

time during which you have had high blood pressure and/or hypertension, whether the high blood pressure and/or hypertension has been constant or temporary, the effects (physical, physiological, mental, etc.) caused by the high blood pressure and/or hypertension, the name and dosage level of medications you have taken to treat the high blood pressure and/or hypertension, the time period during which you took each such medication, the effect (physical, physiological, mental, etc.) of any such medications, the names of all doctors who have treated your high blood pressure and/or hypertension, the names of all doctors who prescribed medication for your high blood pressure and/or hypertension, and whether you have been precluded from or limited in any activity - including, but not limited to, functions such as caring for yourself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working - as a result of the fact that you have high blood pressure and/or hypertension.

ANSWER: In 1991, I went to the doctor for a sinus headache. Upon examination, I was diagnosed as having hypertension. It has been treated with medication without incident. My medical records are produced with my Responses to First Request for Production of Documents.

I have had no physical limitations as a result of my high blood pressure.

Plaintiff reserves the right to seasonably supplement this Answer to Interrogatory.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RICHARD M. STUMBO,
Plaintiff,

vs.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.,
DYNCORP AEROSPACE OPERATIONS, INC.,
and
DYNCORP AEROSPACE OPERATIONS (U.K.), LTD.,
Defendants.

CIVIL ACTION NO. 5:00CV00007

****

ORAL DEPOSITION OF AUSTIN BRYAN

****

December 7, 2000 Fort Worth, Texas

April L. Stuck

* * *

physician. Is he engaged for the sole purpose of reviewing forms or does he actually treat people that work here?

A. His role was solely to review these forms and give an opinion on what was on the form.

Q. Did he give or was - - strike that. Was he given criteria to follow as he was reviewing or was it just purely at his discretion?

A. Well - - and I think I'm the one that absolutely - - I'm confident I was the one that told him, based on the information that I had been given as to the conditions in the theater, what the people would be expected to meet, the criteria, in other words, the working conditions, in other words, and that I - - I told him that the people needed to be medically qualified to do a number of different tasks, to be able to sustain themselves and in a really individualistic type way. In other words, they would have minimal support. By that I mean they would have to go out and find their own place to live, cook their own food or go find food.

At that time, you recall, it was a war area. Our people were turned over to the United Nations and became a part of a United Nations workforce that was then assigned organizationally to the various police departments. And we told - - I told the doctor, Here are the conditions as they are - - have been described to me.

I tell you, I was never there. I have not been there since. I have no way of knowing whether the conditions are as bad as they were described to me. But

they required someone that was fairly independent to move quickly. By that I mean they were still being fired at. It was a dangerous, hazardous situation.

So the physical aspects of this was a very important point that was made to us by the Department of State.

Q. Did you convey this to Dr. McDougall in a memo or did you just call him and say, Doctor - -

A. No.

Q. Let me finish. I'm going to give you a pile of documents, and I want you to evaluate them in light of the following. And you just relayed it to him.

How did you get that message to him?

A. I went to his office, and I took the copy of the physical forms that we would send out to the individuals. And I showed him what I would be bringing him. I told him what we were looking for verbally. I outlined that in as much detail and answered his questions as to what we wanted him to do and why we wanted him to do it. I explained all of that to him.

And during that conversation my recollection was that he asked me questions. I responded to those, those questions, and further defined what those - - what we wanted him to do.

Q. To your knowledge, had he ever done any work for like this for DynCorp before?

A. I have no idea.

Q. How did you select him to do this task?

A. I simply - - I called him. I had occasion to use him as a personal doctor. And I called him and said, Would you do this. He's my personal physician now.

I've had him as a personal physician since about that time. I heard about him through some friends and went to him. And oh, it was probably shortly after I went back to work that I went to him and asked him if he would do this.

Q. To your knowledge, is he still doing this for DynCorp?

A. Yes, sir, he is.

Q. Did you show him on the forms certain

* * *

A. Yes, sir.

Q. And as a result of that, the doctor or, again, someone in his staff, classified the person. And you've talked about the classifications. I think there was what one, two and three or A, B and C, something to that effect?

A. One, two and three.

Q. And you-all relied on that classification?

A. Yes, sir.

Q. Now, you went through the criteria that you talked with Dr. McDougall about orally, and one was number of tasks is what I wrote down.

Do you mean working long hours or how did you explain that to him?

A. I'm not absolutely certain what detail I went into with him. But I did want him to understand that we had had complaints from the State Department, from the United Nations, about the medical condition of some of our personnel. We had people that were unable to walk up flights of stairs, that could not conduct foot patrols.

There were instances where the people were in jeopardy simply because we could not move quickly because their limbs or - - you know, they were either arthritic - - I say arthritic. Perhaps the wrong term. Stiff, had difficulty moving.

What I tried to describe to him was the fact that it was absolutely essential that these people had good health and were able to do the mission that we were asked to do and contracted to do. Our job was to provide people that could do those jobs without any impairment or any loss of capability.

Q. You said you'd received complaints from the government. Was that at this particular or for this particular job in Bosnia?

A. Yes, sir.

Q. They were complaining because the recruits from earlier, the IPM recruits, were unable to do some of the physical tasks that they were called upon to do?

A. That's correct. Some were unable to perform or performed minimally.

Q. And what happened to those people, those people that couldn't walk upstairs or pull foot patrols or pull long hours?

A. I'm not certain what happened to them. Some of them quit. Some of them were medically evacuated. Some of them remained in place and were given other - - less duties. I don't remember if any

* * *

Q. Did you all work off of some chart though that said if you're six feet, you can be in this range and not be overweight or things of that sort.

A. We relied on what the doctor would tell us. If he said he was overweight, then we assumed that the doctor knew what that chart was for his height, age. And that's one of the things that doctors do for you. They tell you he's overweight. There's some standard that's a medical standard.

Q. So then it was the combination of being, according to this report, overweight, a smoker and on these medications that caused you-all to - - the team to say, We're not going to hire this gentleman?

A. Yes, sir.

Q. Was there any one criteria that stood out?

A. No. I don't think so. I think, as I mentioned earlier, that we tried to look at the whole guy. And I have to tell you that we were doing everything we could to get people that were qualified to avoid the risk of having somebody that was not qualified get over there. We wanted people that could do the job.

The job performance was one of the principal elements that we looked at. Can he do it. And when the doctor says that he's not recommended, then that carries a lot of weight.

Q. Did anyone else other than the team participate in this one?

A. My recollection was that we showed this - - I personally took the file, showed this to Mr. Joe Estill. Because I showed him what I was - - what - - you know, the statement that I read to Rick over the telephone. I personally called him and read that statement to him, after it was approved by Mr. Joe Estill.

Q. Who was Joe Estill?

A. He's our vice-president in charge of human resources.

Q. Is he still here?

A. Yes, sir.

Q. He gave you a statement that you can read to Mr. Stumbo?

A. He approved the statements that we had, yes, sir.

Q. Did he have to approve statements given to all people that were not hired?

A. I don't know about all. That's awful encompassing. I don't know that. I know in this case that since I was the one that was going to call Mr. Stumbo, I wanted to be sure that what I said to

* * *

12 August 1996

Richard Stumbo
2351 Mountain Road
Front Royal, VA 22630

Dear Mr. Stumbo:

Enclosed please find materials in response to our most recent conversation with you on the Bosnia IPM contract. Please complete the requirements listed below and follow the instructions for returning the paperwork to our offices. Upon successful completion of the below listed requirements final processing will take place in New York City prior to departure for Zagreb, Croatia and then Bosnia. In order to meet the quick response time-set forth by our customer you must respond immediately to the criteria in this letter.

It is important that the day you receive this package you make arrangements to complete the below tasks within a day or two after receipt of this package. You will not be able to travel without completing these tasks. I apologize for the short turn on these items but we are required to have this information prior to arrival of any candidate in Bosnia.

First, you must complete a pre-employment drug screen and physical. Please take the enclosed Chain of Custody form to the below address for your pre-employment drug screen. This clinic has been informed of our process and should not charge you for the collection. If they do please keep your receipt and return it with the other paperwork.

Please call the clinic at the phone number listed to schedule a time for your drug screen.

Roche Labs/Labcorp
611 Jefferson Davis Hwy #A1
Fredericksburg, VA
703-373-9673 call first

The enclosed Medical Examination form should be used for your physical examination. Please make an immediate appointment with your physician and have this medical form completed. It is important that the physician complete the last page (medical classification and clearance form) of this package. If this form is not completed DynCorp cannot employ you. This medical classification and clearance form must be faxed to our offices immediately upon receipt. The fax number, 817-737-1608, is written on the medical form. Again, keep your receipt and return it with the other paperwork. Our customer is currently not paying for medical examinations but we are in negotiations with them on this matter.

* * *

Second, you must obtain 2 copies of your passport, 4 additional passport photos, and copies of your dental x-rays. This information will be used to process visas in-country and will be maintain in an in-county personal file in case of accident while in-country.

Third, you must complete the below listed forms located in your package and return them as instructed. Please print on all forms so that the information is legible.

1. Foreign Service Agreement (your contract) - read carefully and sign the signature page at the back. Copies of this agreement will be sent to Zagreb and maintained in a personal file. Returned by Federal Express.

2. Employee Profile Form - complete all blanks on this form. Return by Federal Express.

3. Employee Uniform Size inventory - complete and return by fax immediately. Return original by Federal Express.

The offer of employment described in the enclosed Foreign Service Agreement is fully contingent on satisfactory results of the Department of State screenings, Pre-employment Drug Screen and Medical Examination. It is important that you do not leave current employment, sell property, etc.. until DynCorp receives positive completion of all screenings. We will inform you upon receipt of all screening results.

Listed below is a comprehensive list of the enclosed materials and completion instructions.

1. Medical Examination Form with Medical Classification and Clearance Form (complete medical and return.

Medical Classification and Clearance Form by fax immediately). Should complete immediately upon receipt of package. Return original by Federal Express.

2. Chain of Custody Form (take to Drug Screen Facility listed above immediately upon receipt of package. Return original by Federal Express.

3. Obtain 2 copies of current passport photo's (return by Federal Express package).

4. Obtain 4 copies of passport photo's (return by Federal Express package).

5. Obtain a copy of dental x-rays (return by Federal Express package).

6. Employee Profile with every blank filled-in (return by Federal Express package).

7. Employee Uniform Size Inventory (fax to above fax number immediately).

8. Foreign Service Agreement signed (return ALL pages including signed page by Federal Express package).

Upon successful completion of your medical examination and drug screen we will contact you by phone and give instructions concerning final processing in New York.

If you have any questions concerning these materials please feel free to contact the undersigned Art Keener, or Lynn Holland at 817-737-1690, 1691, or 1693, 1569 between 0800 and 1700. We look forward to success in this process and hope to personally meet you in the near future.

Sincerely,

William E. Marcantel
Director of Operations

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

RICHARD M. STUMBO,
Plaintiff,

vs.

DYNCORP PROCUREMENT SYSTEMS, INC.,
DYNCORP AEROSPACE, INC.,
DYNCORP AEROSPACE OPERATIONS, INC.,
and
DYNCORP AEROSPACE OPERATIONS
(U.K.), LTD.,
Defendants.

CIVIL ACTION NO. 5:00CV00007

****

ORAL DEPOSITION OF PETER MCDOUGALL

****

December 7, 2000 Fort Worth, Texas

April L. Struck

* * *

have a certain condition. The HMO would sent that record and recommendation for treatment. You-all would evaluate that or is that too simple or am I off base?

A. It doesn't' work like that.

Q. Would you please explain.

A. A doctor would request to have another doctor see a patient to do a procedure, and they have to have an authorization number. And we would provide that authorization number.

Q. I see. And how are you compensated? Is it on a per review basis, hourly basis?

A. Salary.

Q. Salary?

A. Uh-huh.

Q. You also provide services for DynCorp?

A. Yes.

Q. And what do you do for them?

A. I review medical applications that they send to me.

Q. Are these any particular type of applications or just all types in terms of are they for employees of DynCorp to work in their offices here or abroad or - -

A. No. These are strictly for foreign posts

* * *

* * *

had this relationship with DynCorp? What was the first communication with you about what DynCorp would expect you to do?

A. He asked me to review medical application reports that were sent to DynCorp and to give my opinion.

Q. Opinion of what?

A. Opinion of whether medically these people would be able to be acceptable for these stated posts overseas.

Q. Did he tell you anything else?

A. He gave me a - - initially I remember he gave me about a three- or four-page memo on the circumstances that these people likely would encounter the job - - what the job entailed. It was fairly detailed as I remember.

Q. Do you remember what the circumstances were?

A. At that time the circumstances as stated in, let's say, this memo were quite vigorous. People would be in remote areas. People could be cut off from services. I mean, it was - - it was significant. Not your typical job in an established community.

I believe it also talked about having to do physical activity. And if I'm not mistaken, there as something about terrain hills, something like that. The reason that I was initially contacted, I think, any person was contacted was because this was a program that had, I believe - - at least in the Bosnia, had not been going for that long. And there was some question that some people had got there and were physically just not able to perform the job.

Q. How did you learn that?

A. Austin Bryan told me that.

Q. Did he give you examples of how they couldn't do their job?

A. People physically couldn't climb up hills. I can specifically remember that. This was stated as a fairly rigorous job.

Q. You say climb up hills. You don't mean like climbing Everest or something like that.

A. No. I believe that means that this job, to my understanding, was very much an outside observation sort of patrol - - maybe patrol - - patrol would probably be - - this was kind of walking - - the impression I got at that time, this was walking the beat in a very rugged surrounding.

Q. Did you understand that people would be sleeping out of doors for successive days such as in tents and that kind of thing?

A. I believe that was a living condition that that was possible.

Q. And you say walking. You mean like a march of sorts from one location to another over rough terrain or what did you understand?

A. No. Just that people in a - - I mean, I knew as much from reading the paper and looking at the news about Bosnia as the average citizen. And I could imagine the circumstances that people might be at for the stated job. And that's what I would use in my judgment.

Q. All right. And so I can separate them, were those things that you knew from your independent reading and watching the evening news or were these things that Mr. Bryan told you or were they contained in that memo?

A. I would say the job description was contained in the description of the job that I read.

Q. And that memo was delivered by Mr. Bryan?

A. Yes.

Q. Was there anything in the memo about certain medical conditions that should be watched or

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his concern, as he relayed it, was he had people that couldn't walk up a flight of stairs. And that was a problem.

When you said walk up hills, are you relating it back to his concerns that they had hired people that couldn't walk up flights of stairs?

A. I don't know that he expressed to me the analogy of walking up stairs.

Q. All right. But in any event, when you say walking up hills and physically demanding, you're referring to what he was relaying to you about the problems with DynCorp's medical evaluation process in that prior to you coming on the scene they had had people - - I'll tell you he just gave his deposition - - that literally couldn't walk up a flight of stairs?

A. So your - - the question is.

Q. The question is, when you talk about physically demanding, those are the types of circumstances that he was describing to you, and therefore, I want you to be able to find me people or screen people that don't have problems such as the ones we're having over there right now?

A. He explained some job requirement situations they had for these postings, and I'm going to use my medical judgment to review these forms and form an opinion. And I will give DynCorp that opinion.

Q. And what I'm trying to get at - - and forgive me if you've already gone over this and maybe I didn't hear it - - but what were those conditions, those physical conditions, that these people were going to have to endure?

A. Unstable living conditions or at least not dependable, could well be not living indoors, could well be subjected to some physical hardships. Those are the types of things.

Q. Did you ever comment to Mr. Byran or anyone at DynCorp over the term that you've evaluated these applications that you'd like to see some other information or other information would be helpful to you in this process?

A. I don't think I've specifically requested an updated job description.

Q. But in addition - - well, actually, you've been provided updated job description either orally or in writing over the years?

A. Verbally.

Q. But did you ever say, You know, it would be nice if you had the examining physicians to talk

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Texas Health Care

Harris Center Southwest
6100 Harris Parkway
Suite 250
Forth Worth, TX 76132
(817) 346-5111

Peter G. McDougall, M.D., CCFP, AAFP — DEA # AM7511416
Bob Lilli, M.D., AAFP
Grace Grajales, R.N., FNP-C — DEA # BL1417915

Name: Richard Stumbo
Address: _____ Date: 7/6/96

Rx
Overweight smoker on two hypertension meds. Wouldn't recommend for strenuous work.

/s/ Peter G. McDougall

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Our physician has reviewed your medical records and has advised us that you may not be medically suited for the job environment in Bosnia. This is a heads-up and to recommend that you make no further preparations to go to Bosnia as an IPM. We will advise you of the final determination on Monday, September 9, 1996.

Statement agreed to and as suggested by Joe Estill, Human Resources Dept.

Delivered by /s/ Austin Bryan

Richard M. Stumbo
2381 Mountain Rd.
Front Royal, Va.
Currently Working
Algeria, Address:
Richard M. Stumbo
M.W. Kellogg
6458/DZBH
P.O. Box 4522
Houston, Tx. 77210-4522
Date 12-18-97

Honorable John Warner
225 Russell Building
Washington, D.C. 20510

Dear Senator Warner

My family and I had the pleasure of meeting you years ago at Andy & Mary Scott's Guests' Family Farm Picnic near Front Royal Virginia. Andy asked me to assist in security arrangements for the picnic. It was a pleasure working with Andy and Mary Scott at their home. I retired from the D.C. Metropolitan Police Department in August of 1990 and have worked security assignments since then. In March of 1996 I applied for a job with DynCorp Aerospace Inc. a State Department contractor supplying American Police Monitors

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months later other friends of mine applied for this same job with high blood pressure and were accepted and currently serving in Bosnia. Later I called back to DynCorp talking to a secretary whom I had talked to in the past. She told me to reapply for the job because my position had been given to a friend of someone in the DynCorp office.

When I called about the job openings I was told that the positions were filled. I filed a complaint with the U.S. Equal Employment Opportunity Commission in October 1996, at the Dallas Texas Office. Ms. Olga Cardennas (phone: 214-655-3392 fax 214-655-3443) was assigned my case. A document was sent to me (enclosed) of the charges against DynCorp. In over a year I have received this document and one phone call from Ms. Cardennas. I have called many times and left a message on her telephone only to receive no reply. I would like to know the status of this case and receive some kind of update from time to time.

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